

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA**

Fair Isaac Corporation and myFICO Case No. 06-cv-4112 (ADM-JSM)
Consumer Services, Inc.;

Plaintiffs,

v.

Experian Information Solutions Inc.;
Trans Union, LLC; VantageScore
Solutions, LLC; and Does I through
X;

Defendants.

Fair Isaac's Brief in Support of Certain Newspaper Articles

Fair Isaac seeks to introduce newspaper articles and trade publications to show the association between the FICO® score and the 300-850® mark. These articles are not hearsay because they are not “offered into evidence to prove the truth of the matter asserted.”¹ Fed. R. Evid. 801(c).

Evidence from newspaper and magazine articles can show secondary meaning and how the mark has gained significance in the mind of a consumer. “To establish public identification of a mark with a product or service, a court may look to use of the mark in ‘advertising brochures, catalogs, newspaper ads,

1. With respect to authentication, the Federal Rules of Evidence provide that newspaper articles and periodicals are self-authenticating. Fed. R. Evid. 902(6).

and articles in newspapers and trade publications,’ and media outlets such as television and radio.” *Dallas Cowboys Football Club v. America’s Team Properties, Inc.*, 616 F. Supp. 2d 622, 633-634 (N.D. Tex. 2009) (internal citations omitted). In *Dallas Cowboys*, plaintiff offered a “broad swath of references throughout the popular and sporting press that refer to the Dallas Cowboys as ‘America’s Team.’” *Id.* Similarly, Fair Isaac seeks to introduce newspaper articles and trade publications to prove secondary meaning and to show that the public associates Fair Isaac’s 300-850® mark with its FICO® score. *See also Northwest Airlines v. Bauer*, 467 F. Supp. 2d 957 (D.N.D. 2006) (explaining that Northwest Airlines has continuously used its NORTHWEST mark and “[m]any thousands of article and stories related to the services by Northwest have been publish via newspapers and magazines, radio, television and the Internet”); *Boston Athletic Association v. Sullivan*, 867 F.2d 22, 30-31 (1st Cir. 1989) (numerous magazine and newspaper articles show that the public was continuously exposed to the fact that BAA sponsored the Boston Marathon).

Eighth Circuit law supports admitting newspaper articles over hearsay objections when the articles are not offered to prove the truth of the matter asserted. *See U.S. v. Mills*, 987 F.2d 1311, 1315 (8th Cir. 1993)(stating that “the district court properly permitted the government to use the [newspaper articles] for the limited purpose of proving that [the defendant] intended to defraud the

borrowers.”); *U.S. v. Darden*, 70 F.3d 1507, 1537 (8th Cir. 1995) (“While inadmissible to prove the assertions made in the articles and documents, these [articles and other documents] were not hearsay for the purposes for which they were offered”).

Therefore, the articles and trade publications are not hearsay, and this court should receive Fair Isaac’s exhibits for the purpose of showing that the public associates the 300-850® mark with the FICO® score.

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